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IN THE

Supreme Court of the United States

CHICAGO TITLE INSURANCE CORP.,

Petitioner,

v.

FIRST AMERICAN TITLE INSURANCE CO. AND JAMES A. MAGNUSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Brief in Opposition ("BIO") describes this case as a "factbound decision" involving the "unexceptional application" of *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003). That description is mistaken. This case does not involve the question of whether a particular punitive damages award is excessive on the specific facts of an individual case. Rather, this case presents a purely legal question going to the very nature of the "guideposts" articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1995) – namely, whether those guideposts regulate merely the *size* of punitive damages awards, or whether they also constrain the power of a State to prescribe by statute the types of misconduct that are so egregious as to warrant punitive liability at all. *Cf. Lochner v. New York,* 198 U.S. 45 (1905). This case also presents two additional questions regarding the meaning of the first *Gore* guidepost, on which the lower courts are divided. The purely legal nature of the questions presented renders much of the BIO simply irrelevant.

I. The Questions Are Properly Presented.

1. The BIO contends that review is unwarranted because the Sixth Circuit ordered a partial new trial on compensatory damages. BIO 6. That argument is misplaced. The Sixth Circuit has already decided the federal law questions in this case, and its decision is final with respect to them. The Court of Appeals' resolution of the punitive damages issue will be unaffected by any further proceedings in the District Court; under the Sixth Circuit's decision, those

proceedings will be limited to determining the appropriate quantum of *compensatory* damages under Ohio law.[1] The BIO does not suggest that Chicago Title will be able to request punitive damages at the new trial. Thus, the remand will neither illuminate the questions presented nor produce another federal law issue for this Court to resolve.

The Court of Appeals' decision presents recurring, clear-cut questions of law regarding the nature of the *Gore* factors. That decision will have precedential effect in the Sixth Circuit and will bind all district courts throughout that Circuit as to the meaning of *Gore* and *State Farm*. The very authority cited by First American explains that, "where ... there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern et al., Supreme Court Practice § 4.18, 259 (8th ed. 2002) (cited at BIO 7); *see also* 17 Charles Alan Wright, et al., Federal Practice and Procedure § 4036, at 10 (2d ed. 1988 & Supp. 2007) ("[T]here is no requirement that there be a 'final' decision; once a case has come to be in the court of appeals, the Supreme Court may grant certiorari to review interlocutory decisions."). This Court has frequently granted review of cases in a similar posture. [2]

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[1] The District Court granted Chicago Title partial summary judgment on its tortious interference claim, Pet. App. 17a-18a, and the Sixth Circuit upheld this ruling. *Id.* at 16a-18a.

[2] Recent cases reviewed in an interlocutory posture include *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *United States v.*

First American itself articulates the reason that, in this circumstance, the Court's practice is to grant certiorari rather than awaiting a later appeal that may never occur: "the result of the new trial on compensatory damages may render the punitive damage analysis moot" if the jury "decides to award compensatory damages of $0." BIO 6. In such a circumstance, the Court of Appeals' judgment would be effectively unreviewable, notwithstanding its precedential effect for other cases in the Sixth Circuit. If anything, the remand ordered by the Court of Appeals heightens the need for this Court to grant review now, to ensure that the Sixth Circuit's decision does not remain on the books. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) ("The [] question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.").

2. Next, First American argues that "the lack of a compensatory award makes it impossible to

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Grubbs, 547 U.S. 90 (2006); *Gonzales v. Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Gonzales v. Raich*, 545 U.S. 1 (2005); *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 164-65 (2004); *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 21-22 (2004); *Dastar Corp. v. 20th Century Fox*, 539 U.S. 23 (2003); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488 (2003); *City of Cuyhoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *Pierce County v. Guillen*, 537 U.S. 129 (2003).

calculate the ratio of compensatory damages to punitive damages." BIO 6. But that argument presupposes that this case presents an ordinary excessiveness challenge. There is no need to "calculate the ratio" in order to review the legal issue here: whether the *Gore* factors may be transformed into a new substantive due process standard for deciding which sorts of conduct categorically may be made subject to *any* punitive damages at all. The Court can clarify the limits of a due process review irrespective of the compensatory award in this case, allowing the eventual due process review in this case (and all future cases) to be guided by that clarification. Thus, the matter of a ratio is irrelevant for present purposes.

3. First American also maintains that there is an "independent and adequate state law ground for resolving the punitive damages issue in this case," based on its contention that Chicago Title's proof did not satisfy the Ohio definition of "malice." BIO 7. But First American confuses cases arising in federal court with those arising from state court. This Court's power under 28 U.S.C. § 1254 to review federal court decisions is plenary, and "there is no need to honor independent and adequate procedural grounds." 17 Charles Alan Wright, et al., Federal Practice & Procedure: Jurisdiction § 4036 (3d ed. & 2007 supp). *See Forsyth v. Hammond*, 166 U.S. 506, 513-14 (1897). Moreover, the Sixth Circuit did not reach the state-law ground proposed by First American. BIO 8; Pet. App. 29a n.9. Accordingly, the doctrine of "adequate and independent state-law grounds" would not apply in any event. *See Michigan v. Long*, 463 U.S. 1032, 1039 & n.4 (1983); *City of*

Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 242 (1983); *Oregon v. Kennedy*, 456 U.S. 667, 670-71 (1982); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938).

II. The Questions Merit Review.

1. The first Question Presented asks whether the *Gore* guideposts license federal judicial interference with a State's considered judgment that certain types of misconduct are so egregious as to warrant punitive liability. Although the BIO accuses Chicago Title of a "dramatic reading of the Sixth Circuit's holding," the BIO essentially concedes the import of that reading by admitting that the court of appeals opined that "in certain instances any punitive award would be 'grossly excessive.'" BIO 9-10. If "due process in some instances will not permit an award greater than $0," BIO 10, then the guideposts have stripped state legislatures and Congress of their authority to prescribe punitive liability for certain categories of misconduct.

The BIO offers no defense of the Sixth Circuit's judgment on the merits. The BIO cites no case in which any other court has applied the *Gore* guideposts to preclude punitive liability altogether.[3]

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[3] The BIO's citation to *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (CAFC 2003) (cited at BIO 10), is curious, because that case – far from extinguishing punitive liability on the basis of the *Gore* guideposts – in fact upheld a punitive award similar in magnitude to the award in this case, even when malice was the only reprehensibility factor. *Id. at* 1370 ("the facts alleged herein do not demonstrate any of the criteria enhancing reprehensibility mentioned in *Gore*, such as an act of violence, disregard for the health and safety of others, a pattern of misconduct, or the exploitation of a financially

Nor does the BIO deny that such an expansion of the *Gore* guideposts would represent a serious affront to principles of federalism and the separation of powers.

The BIO asserts that *State Farm* "clearly envisions instances where a court, applying *State Farm's* due process limitations, would hold that no punitive damages are appropriate." BIO 10-11. But if that is the message of *State Farm*, no lower court except the Sixth Circuit has received it. Even under the BIO's interpretation of *State Farm*, certiorari would be imperative to clarify the message. Moreover, the BIO fails to address the extensive analysis in both *Gore* and *State Farm* making clear that the guideposts are confined solely to the question of gross excessiveness and do not limit the power of a State to impose punitive liability on certain classes of misconduct. *See Gore*, 517 U.S. at 568, 574, 580, 585; *State Farm*, 538 U.S. at 419 ("we do not suggest there was error in awarding punitive damages"). Thus, *State Farm* remanded the matter for "[t]he proper *calculation* of punitive damages." *Id.* at 429 (emphasis added).

The BIO's citation to *State Farm,* 538 U.S. at 419 ("punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence"), ignores the principle that the legislature has a constitutionally

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vulnerable target") (citation omitted). *Rhone-Poulenc* thus supports Chicago Title's argument on both the first and second Questions Presented.

recognized role in defining what types of misconduct qualify as "reprehensible."

2. The second Question Presented asks whether a showing of malice satisfies the "reprehensibility" guidepost, or whether it requires a showing of an additional aggravating factor, such as the financial vulnerability of the plaintiff or the risk of physical harm. The BIO denies that the Sixth Circuit created a "bright-line rule," but its denial rests on a claim that the court of appeals "merely assumed malice 'for sake of argument.'" BIO 11. The BIO's assertion is simply another way of saying that the Sixth Circuit framed this case as presenting the question whether the "reprehensibility" guidepost could be met solely by a showing of malice, with no other aggravating factor. Pet. App. 28a ("Here, the only factor present is that First American acted with malice."); *id.* ("[T]he fact that First American acted maliciously is insufficient to support a finding that First American's behavior was sufficiently reprehensible for an award of punitive damages."). The Sixth Circuit held that malice, standing alone, could not support a punitive award as a matter of due process. That is the essence of a bright-line rule.

The BIO does not address Chicago Title's extensive showing that the Sixth Circuit's ruling conflicts with both *Gore* and *State Farm*. Indeed, the defendant in *Gore* was not guilty even of intentional affirmative misconduct. 517 U.S. at 576, 579, 580. Nor does the BIO recognize the threat posed by the Sixth Circuit's decision to the ability of States to impose punitive damages for economic torts (which, in cases involving commercial actors, will frequently present no aggravating factors besides malice) and to

the authority of Congress to prescribe punitive damages for statutory violations solely on the basis of malice. In this respect, the Sixth Circuit's decision cannot be squared with *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 538 (1999).

Predictably, the BIO denies the existence of a circuit split. BIO 12-13. Yet it analyzes only a handful of the cases cited in the Petition. And the BIO's denial of a split is apparently premised on revisionist arithmetic – on double-counting reprehensibility factors.[4] The bottom line is that the

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[4] When this Court inquired in *Gore* whether "the harm was the result of intentional malice. trickery, or deceit, or mere accident," 517 U.S. at 419, it did not suggest that fraudulent conduct would be counted twice – once as "intentional malice" and again as "deceit." Thus, the BIO errs in claiming that *Rhone-Poulenc* and *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 829 (CA8 2004), *cert. denied*, 543 U.S. 1150 (2005), involved multiple reprehensibility factors in addition to malice. BIO 12-13. Moreover, while the BIO notes the statement of the district court in *Eden Elec.* that it could "hardly think of a more reprehensible case of business fraud," BIO 12-13, it fails to mention the District Court's similar comment in this case that First American's conduct was "particularly egregious." Pet. App. 51a.

The BIO's attempt to distinguish *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (CA7 2003), fails. The court's sole comment regarding reprehensibility was that the "defendant's behavior was outrageous." *Id.* at 677. The "slight" nature of the compensable harm, *id.*, was relevant to the ratio guidepost rather than reprehensibility.

The BIO's efforts to dismiss *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63-64 (CA2 2004), *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 233 (CA3 2005), and *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-40 (CA8 2005), miss the forest for the trees. In contrast to the Sixth Circuit's bright-line approach, the other circuits have rejected a mechanical focus "on how many relevant [reprehensibility]

Sixth Circuit's decision conflicts with numerous decisions holding that malice alone is a sufficient basis, as a matter of due process, for an award of punitive damages.

3. The third Question Presented asks whether a defendant qualifies as a "repeated wrongdoer" by committing multiple reprehensible acts within a single transaction with the plaintiff, or whether the test requires that additional acts be committed against parties other than the plaintiff. The BIO admits that the Sixth Circuit's judgment conflicts with a decision in the Third Circuit, as well as with decisions in Illinois and Arkansas. BIO 14 & n.1 (citing *CGB Occupational Therapy, Inc. v. RHA Health Servs.*, 499 F.3d 184, 191 (CA3 2007); *Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 870 N.E.2d 303, 318-19 (Ill. 2006), pet. for cert. filed (No. 07-560); *Superior Fed. Bank. v. Jones & Mackey Constr. Co.*, 219 S.W.3d 643 (Ark. Ct. App. 2005)). The existence of this split, by itself, warrants review. Moreover, the split is deeper than the BIO acknowledges, because the Ninth Circuit has held that conduct toward the same plaintiff can establish recidivism and that conduct toward other parties generally cannot, while the Second Circuit has upheld a finding of reprehensibility based on the defendant's conduct toward other parties.[5] There is

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factors" a defendant's conduct manifests. *Motorola*, 388 F.3d at 64.

[5] Compare *Southern Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001, 1010 (CA9 2005) (finding "repeated actions" factor met, in part because "[w]hen [plaintiff] challenged him and began litigation, [defendant's] effort at concealment continued: 'he persevered in hiding his wrongful acts throughout the trial and

an urgent need for certiorari to address these divergent decisions.

This Court has never clarified whether a finding of recidivism requires a showing that the defendant has harmed parties other than the plaintiff. The BIO's argument that recidivism includes injury to third parties (BIO 15-16) does not exclude the possibility that it also encompasses repeated acts directed at the plaintiff. Certainly, the Sixth Circuit's demand for evidence regarding harms to third parties has created precisely the constitutional risk that the Court condemned in *State Farm* and *Philip Morris* – namely, that juries and trial courts might use punitive damages to punish a defendant for wrongdoing against absent parties rather than against the plaintiff. *See* 127 S. Ct. at 1062; 538 U.S. at 422-23.

The BIO's argument that the record does not contain evidence of repeated misconduct directed at the plaintiff (BIO 16) is flatly wrong, as the District Court found. Pet. App. 49a ("Defendant's conduct involved repeated actions spread out over a notable period of time"); *id.* ("[T]here was not one infraction but multiple infractions involved in Defendant's business plan to profit from their misconduct *here.*") (emphasis in original). Moreover, regardless of what

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in particular while testifying in Court before the jury'"), with *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 959 (CA9 2005) ("not a great deal of weight can be put on [defendant's] past behavior because that conduct did not harm these particular doctors"), and *Lee v. Edwards,* 101 F.3d 805, 809 (CA2 1996) "(A finding of repeated misconduct is supportable by testimony in the trial transcript as to other complaints against [defendant] charging excessive force.").

the record shows, the Sixth Circuit premised its decision solely on the legal meaning of the "repeated misconduct" element of the reprehensibility guidepost, *id.* at 26a-27a, and this Court's review is needed to address that question of law.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, the Sixth Circuit's judgment should be summarily reversed.

Respectfully submitted,

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